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No. 01-___

IN THE

Supreme Court of the United States

PHILLIP MULDER, GLENN HILTON, CHARLES BUCK, LEON GIBBONS, REBECCA MCREYNOLDS and BARBARA KIPP,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 2002

39 pages

QUESTIONS PRESENTED

In *Ellis v. BRAC*, 466 U.S. 435, 451-53 (1984), this Court held that labor unions governed by the Railway Labor Act may not require objecting nonmembers to pay compulsory dues for union "organizing" campaigns. In *CWA v. Beck*, 487 U.S. 735, 745 (1988), this Court compared the "union security" provisions of the Railway Labor Act and the National Labor Relations Act and held that they are "in all material respects identical."

I. May a labor union governed by the National Labor Relations Act require objecting nonmembers, as a condition of employment, to pay compulsory dues for union organizing campaigns?

II. If the National Labor Relations Act is properly construed to compel objecting nonmembers to fund union organizing campaigns as a condition of employment, is the statute unconstitutional as applied?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners below were Phillip Mulder, Leon Gibbons, Charles Buck, Glenn Hilton, Rebecca McReynolds and Barbara Kipp. United Food and Commercial Workers Local 1036 was a cross-petitioner.

The Respondent below was the National Labor Relations Board.

Intervenors below were United Food and Commercial Workers, Locals 7 and 951.

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IN THE

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PHILLIP MULDER, LEON GIBBONS, CHARLES BUCK, GLENN HILTON, REBECCA MCREYNOLDS AND BARBARA KIPP,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Phillip Mulder, Leon Gibbons, Charles Buck, Glenn Hilton, Rebecca McReynolds and Barbara Kipp respectfully pray that a writ of *certiorari* issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 25, 2002.

OPINIONS BELOW

The *en banc* March 25, 2002 opinion of the United States Court of Appeals for the Ninth Circuit, Appendix A ["App."] at 1a, is reported at 284 F.3d 1099. The September 14, 2001 Order of the United States Court of Appeals for the Ninth Circuit vacating the opinion of the original panel and ordering that the case be reheard *en banc*, App. B at 25a, is reported at

265 F.3d 1079. The August 2, 2001 Order of the panel finding that the petitions for rehearing *en banc* were timely filed, App. C at 27a, is unreported. The June 28, 2001 *sua sponte* Order of the panel requiring briefing on whether the case should be reheard *en banc*, App. D at 29a, is unreported. The May 17, 2001 decision of the original three-judge panel, App. E at 31a, is reported at 249 F.3d 1115. The September 30, 1999 Decision and Order of the National Labor Relations Board, App. F. at 40a, is reported at 329 N.L.R.B. 730. The January 31, 1997 Supplemental Decision of the Administrative Law Judge, App. G at 95a, is reported at 329 N.L.R.B. 747.

JURISDICTION

A three-judge panel of the Ninth Circuit issued its opinion on May 17, 2001. On June 28, 2001, the panel issued a *sua sponte* order requiring the parties to file briefs on whether the case should be reheard *en banc*. The NLRB and the intervening unions filed responses and formally petitioned that the case be reheard *en banc*. On August 2, 2001, the panel ruled that all petitions for rehearing *en banc* were timely filed. On September 14, 2001, the full court vacated the panel opinion and ordered the case reheard *en banc*. On March 25, 2002, the *en banc* court of appeals issued the opinion from which the writ of *certiorari* is being sought, and the time for filing this petition runs from that date. This petition is therefore timely filed under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1) (West 2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* and the Railway Labor

Act, 45 U.S.C. § 151 *et seq.* It also involves the First, Fifth and Fourteenth Amendments to the United States Constitution. The pertinent texts are set forth in Appendices H at 137a and I at 138a.

STATEMENT OF THE CASE

Petitioners Philip Mulder, Charles Buck and Leon Gibbons ("Petitioners" or "Nonmembers") worked for Meijer, Inc. ("Meijer"), a regional food and general merchandise retail chain based in Grand Rapids, Michigan. Their collective bargaining agent was United Food and Commercial Workers Local 951 ("Local 951"), a union that represents employees in widely disparate bargaining units and industries, including retail grocery stores, mercantile stores, food processing factories, a nursing home, pet food processing factories and various distribution centers. The collective bargaining agreement between Local 951 and Meijer contained a clause requiring all employees to join the union or pay dues as a condition of continued employment.

At various times in 1988 and 1989, these three Nonmembers resigned from membership in Local 951 and objected, under *CWA v. Beck*, 487 U.S. 735 (1988), to the use of their compulsory dues for political and nonrepresentational activities. Local 951 provided them with financial disclosure about the union's expenditures. This disclosure showed that both Local 951 and its parent affiliate, United Food and Commercial Workers International ("UFCW"), spent significant portions of the dues and fees collected on "organizing" employees of employers besides Meijer. Local 951 included these organizing expenditures within the "chargeable" portion of the dues that the Nonmembers were required to pay under the compulsory unionism clause.

Petitioners Rebecca Kipp and Barbara McReynolds ("Petitioners" or "Nonmembers") worked for City Markets, Inc. ("City Markets"), a Colorado grocery retailer, at separate bargaining unit stores in the rural mountain towns of Glenwood Springs and Fruita, Colorado. Their collective bargaining agent was UFCW Local 7 ("Local 7"), a union that also represented employees of many other employers in the retail grocery and meat packing industries throughout Colorado and Wyoming. The collective bargaining agreement between Local 7 and City Markets also contained a clause requiring all employees to join the union or pay dues as a condition of continued employment.

In July 1989, Kipp and McReynolds resigned from membership in Local 7 and objected under *Beck* to the use of their compulsory dues for political and nonrepresentational activities. Local 7 provided them with financial disclosure which showed that the union spent significant portions of the compulsory dues on "organizing" employees of employers besides City Markets, and charged them for all of its organizing expenses.

Between 1988 and 1991, all of these Nonmembers, as well as other nonunion employees in different locations, filed dozens of separate unfair labor practice charges with the National Labor Relations Board ("NLRB") against various UFCW local unions, alleging numerous failures to comply with *Beck*. The major issue raised in these unfair labor practice charges was whether the UFCW local unions could require objecting nonmembers to subsidize union efforts to "organize," and recruit as members, employees of other employers.

On October 25, 1991, after investigating these unfair labor practice charges, the NLRB General Counsel issued a nationwide consolidated complaint against Locals 7, 951, and several other UFCW local unions. In part, the complaint alleged that Locals 7 and 951 violated the National Labor Relations Act

("NLRA") by charging objecting nonmembers for expenses incurred in organizing employees of other employers. In their answers and at trial, the unions admitted these facts.

On January 14, 1992, a nationwide trial commenced before an NLRB Administrative Law Judge ("ALJ"). The overriding issue at trial was the chargeability or nonchargeability of union organizing expenditures. The General Counsel and the Nonmembers took the position that all such expenditures are nonchargeable as a matter of law under *Ellis v. BRAC*, 466 U.S. 435 (1984), and *CWA v. Beck*, 487 U.S. 735 (1988). They objected to the admission of the unions' factual and expert testimony on organizing, believing this issue to be settled as a matter of law under *Ellis* and *Beck*. Despite these objections, the ALJ permitted the unions to introduce the testimony of two economists and several union officials, who testified to the notion that higher levels of unionization bring more success at the bargaining table.

In rebuttal, the General Counsel called Professor Morgan Reynolds, a labor economist from Texas A & M University, as an expert witness. Professor Reynolds testified that the relationship between the level of unionization and wages is "weak and tenuous," and that many other complex variables, including the general unemployment level, are much greater wage determinants.

On January 31, 1997, the ALJ issued a Supplemental Decision. App. G at 95a.[1] The ALJ did not make findings of

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[1] On March 7, 1995, the ALJ issued an initial decision dismissing the General Counsel's complaint in its entirety. This ruling was predicated on the fact that, seven years after this Court's decision in *Beck*, the NLRB still had not addressed nonmembers' right to refrain from supporting union political and other nonrepresentational activities. Shortly thereafter, the

(continued...)

fact or rule directly on the testimony of the various experts, recognizing the evidence about organizing to be conflicting. He stated:

> During the hearing, different experts testified in support of the opposing positions on this issue. It may well be that in different industries and in different geographic areas the extent of organization of the work force may or may not, in reality, support or refute the abstract proposition that wages, benefits and employment conditions of employees working for one employer are affected by those which prevail in the industry or area.

App. G at 131a.

Nevertheless, the ALJ held that objecting nonmembers could be required to pay for union organizing activities directed at employees of other employers. He reasoned that "organizing activities are a necessary incident of collective bargaining and contract administration." *Id.* at 132a. The ALJ did not find this Court's decision in *Ellis* to be binding, holding that "the Railway Labor Act and public sector precedent does not govern evaluation under the Act of union expenditures and of allocation concerning them." *Id.* at 129a.

The Nonmembers filed timely exceptions with the NLRB. On September 30, 1999, a divided NLRB affirmed the ALJ and held that objecting nonmembers can be required to financially support union organizing, "at least with respect to organizing

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[1](...continued)
NLRB decided *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), its first case interpreting *Beck*. On April 2, 1996, in an unpublished decision, the NLRB remanded this case to the ALJ for a supplemental decision in light of *California Saw*.

within the same competitive market as the bargaining unit employer." App. F at 53a. The NLRB majority refused to apply *Ellis*, believing that case to be specific to the Railway Labor Act ("RLA"), and distinguishable because, they asserted, the NLRA's principal purpose is to "foster organizing across employer lines." *Id.* at 64a. Member Brame dissented, finding that the majority's attempt to distinguish this Court's RLA and NLRA precedents is foreclosed by *Beck's* holding that § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), has the same meaning as § 2, Eleventh, of the RLA, 45 U.S.C. § 152, Eleventh. App. F at 79a, 84a-90a.

Timely Petitions for Review were filed in both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Ninth Circuit. On October 22, 1999, pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit as the forum to consolidate these petitions for review.

On May 17, 2001, a three-judge panel of the Ninth Circuit unanimously reversed the NLRB.[2] 249 F.3d 1115, App. E at 31a. The panel held that the NLRB was bound by the holding of *Ellis,* 466 U.S. at 452, that union "organizational efforts were not what Congress aimed to enhance by authorizing the union shop," and by the holding of *Beck,* 487 U.S. at 745, that the provisions of the RLA and the NLRA authorizing "union-security" agreements are "in all material respects identical." Relying on *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992), the panel reasoned that the NLRB was owed no deference in this case, because "the Board does not have a free

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[2] Senior Judge Noonan wrote the opinion for the unanimous panel, which included Judges McKeown and Wardlaw. Judge Wardlaw issued a separate concurring opinion. App. E at 38a.

hand to interpret a statute when the Supreme Court has already interpreted the statute," and "does not have the power to reverse the Supreme Court." 249 F.3d at 1119-2000, App. E at 35a-37a.

On June 28, 2001, the same three-judge panel *sua sponte* issued an order requiring briefing on whether the case should be reheard *en banc*. App. D at 29a. The NLRB and the unions filed petitions for rehearing *en banc*, which were deemed by the panel to be timely filed. App. C at 27a. On September 14, 2001, the Ninth Circuit vacated the panel opinion and ordered the case reheard *en banc*. App. B at 25a.

In an opinion authored by Judge Stephen Reinhardt, the *en banc* Ninth Circuit panel unanimously upheld the NLRB majority's ruling that objecting nonmembers can be required to subsidize union organizing activities "within the same competitive market." 284 F.3d 1099 (2002), App. A at 1a.[3] According to Judge Reinhardt's opinion, *Ellis*' ruling that organizing is outside of Congress' authorization is limited solely to the RLA, and binds neither the NLRB nor the courts when applying the NLRA. App. A at 19a-22a.

As to *Beck*, Judge Reinhardt also found that decision narrow and limited. "We should first remove any question as to whether the *Beck* Court dealt with the question of *what* activities are germane to collective bargaining. It did not." App. A at 17a. Judge Reinhardt found nothing in *Beck* controlling on the organizing issue, because *Beck* did not itself hold that organizing is nonchargeable, instead leaving "to the [Fourth Circuit] Court of Appeals the ultimate resolution of the

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[3] Judge Wardlaw, who had issued a separate concurrence supporting the original panel opinion, reversed herself and this time agreed with the *en banc* opinion. *Compare* 249 F.3d at 1120-21, App. E at 38a, *with* 284 F.3d at 1102, App. A at 2a.

question of which specific expenditures were germane and therefore chargeable to nonmembers." App. A at 17a. What Judge Reinhardt did not mention, however, is that the *en banc* Fourth Circuit, which did resolve this question, held unanimously that organizing activities are nonchargeable under the NLRA, precisely *because* of *Ellis*' binding precedent. *Beck v. CWA*, 776 F.2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (4th Cir.1986), *aff'd*, 487 U.S. 735 (1988).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The *En Banc* Decision of the Ninth Circuit Is Directly Contrary to This Court's Decisions in *Ellis* and *Beck*, and This Court's Entire Body of Compulsory Dues Law.

A. Introduction. In *Ellis*, this Court held that labor unions governed by the RLA may not require objecting nonmembers to pay compulsory dues for union "organizing" campaigns. 466 U.S. at 451-53. In *Beck*, this Court compared the "union-security" provisions of the RLA and the NLRA and held that they "are in all material respects identical." 487 U.S. at 745.

Despite these holdings, the *en banc* Ninth Circuit vacated a unanimous decision of its own three-judge panel, App. E at 31a-39a, and found organizing to be a chargeable expense that NLRA-covered nonmembers must bear. Astonishingly, the *en banc* Ninth Circuit proclaimed that faithfulness to this Court *required* it to reject the authority of *Ellis* and *Beck*. "The Supreme Court has repeatedly admonished the lower courts against overreading its precedents, and we find that admonishment particularly applicable here." 284 F.3d at 1113, App. A at 22a.

The Nonmembers respectfully submit that the Ninth Circuit should concern itself not with "overreading" this Court's precedents, but rather with *reading* them. A fair reading of *Ellis* and *Beck* leads inescapably to the conclusion that Judge Reinhardt and the Ninth Circuit simply rejected this Court's precedents. *See, e.g., Department of Housing & Urban Dev. v. Rucker*, 535 U.S. ___, ___, 122 S. Ct. 1230, 1236 (2002) (reversing the Ninth Circuit, holding that "Congress has directly spoken on the precise question at issue"); *United States v. Arvizu*, 534 U.S. 266, ___, 122 S. Ct. 744, 747 (2002) (the approach taken by the Ninth Circuit "departs sharply" from this Court's teachings); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curium) ("To be sure, the Court of Appeals here recited [the proper] principles, but its application of them is nothing short of baffling"); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) ("the Ninth Circuit's holding is in direct conflict with our precedents"); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) ("It is difficult to understand how the Ninth Circuit could have failed to see this from our cases"); *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (Ninth Circuit "cited no authority" in reaching its conclusion); *Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94, 109 (1988) ("the reasoning of the Court of Appeals . . . is not supported by our cases, and has been consistently rejected by other Circuits and by other panels in the Ninth Circuit"). Intervention by this Court is needed to correct a serious abuse of the nation's primary labor law.

B. *Ellis* Could Not Be Clearer: All Union Organizing Is "Outside Congress' Authorization." In *Ellis v. BRAC*, 685 F.2d 1065 (9th Cir. 1982) (2-1 decision), *rev'd in pertinent part*, 466 U.S. 435 (1984), the Ninth Circuit found union organizing expenses chargeable to nonmembers covered by the RLA:

> [M]aximum organization of an industry benefits employees and units already organized. A union is considerably strengthened if it eliminates competition from non-union employers. . . . Successful organizing efforts thus can strengthen the union's position at the collective bargaining table immeasurably.

685 F.2d at 1074.[4]

This Court flatly rejected that proposition, unanimously overruling the Ninth Circuit: "Despite this attenuated connection with collective bargaining, . . . such expenditures are outside Congress' authorization." *Ellis*, 466 U.S. at 451. Notwithstanding this Court's unambiguous rejection of the Ninth Circuit's rationale under the RLA, the *en banc* Ninth Circuit has now resuscitated the identical proposition under the NLRA.

In *Ellis*, this Court identified three specific considerations for its holding that nonmembers need not support union organizing. The *en banc* Ninth Circuit either ignored these considerations or found them limited exclusively to the RLA based upon what it called *Ellis*' "close review" of that statute and its legislative history. App. A at 19a. However, the notion that *Ellis* is irrelevant under the NLRA is demonstrably false after *Beck* found RLA § 2, Eleventh and NLRA § 8(a)(3) to be "statutory equivalent[s]," with "identical" congressional purposes. *Beck*, 487 U.S. at 746-47. Indeed, the three factors cited in *Ellis* apply with equal vigor under the NLRA.

First, *Ellis* unequivocally rejected the argument that nonmembers could be required to contribute to the overall strength of the union because strong unions achieve greater

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[4] The Ninth Circuit majority opinion in *Ellis* was written by Circuit Judge Pregerson, one of the members of the *en banc* court below.

success at the bargaining table and across bargaining unit lines: The "notion that § 2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history." *Ellis*, 466 U.S. at 451. Attempting to distinguish this holding, the *en banc* Ninth Circuit found that the NLRA is different from the RLA because "organizing is central to the purpose of the NLRA," and the failure to organize other employers "weakens the union's ability to bargain with the employer." App. A at 12a.

But the Ninth Circuit's notion of "strengthening union power" above all else is absent from any fair reading of the text or legislative history of § 8(a)(3) of the NLRA, just as *Ellis* found it absent from § 2, Eleventh of the RLA. While the NLRA (like the RLA) sets up a process by which unions may recruit willing employees as members, it does not give unions unfettered power to do so—with other people's money or property. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (limiting a UFCW union's organizing activity on private property, and holding that by "its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers"); *see also Pattern Makers League v. NLRB*, 473 U.S. 95, 101-05 (1985) (policy of the NLRA is employee free choice and "voluntary unionism," not compulsory membership).

In short, the NLRA is indistinguishable from the RLA on the precise issue presented here, contrary to the strained rationale of the *en banc* Ninth Circuit.

Second, *Ellis* held:

> where a union shop provision is in place and enforced, all employees *in the relevant unit* are already organized. By definition, therefore, organizing expenses are spent on employees outside the

> collective-bargaining unit already represented. Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer.

466 U.S. at 452 (footnote omitted & emphasis added). The *en banc* Ninth Circuit never directly addressed this critical point, or the fact that the NLRA, like the RLA, revolves around employees in "relevant bargaining units." *See generally* NLRA § 9(b), 29 U.S.C. § 159(b) (specifying that "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," not *any* unit tenuously related to the original unit); *see also Pall Corp. v. NLRB*, 275 F.3d 116, 120 (D.C. Cir. 2002), *citing Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959) (an issue arising outside the bargaining unit may be a mandatory subject of bargaining only if it "vitally affects" the terms and conditions of employment within the bargaining unit); *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971) (retirees' health benefits not a mandatory subject of bargaining because those individuals are outside the relevant unit).

Indeed, *Ellis* also applied the "relevant bargaining unit" analysis to determine whether other union expenses, besides organizing, were chargeable to nonmembers. For example, out-of-unit litigation expenses were held nonchargeable precisely because they do not relate to the nonmembers' specific unit.

> The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees. Contrary to the view of the Court of Appeals, therefore, unless the Western

> Airlines bargaining unit is directly concerned, objecting employees need not share the costs of the union's [litigation].

466 U.S. at 453.

Although the *en banc* Ninth Circuit failed to address *Ellis*' "relevant bargaining unit" analysis or apply its teachings, there is no reason to believe that this analysis arbitrarily changes from the RLA to the NLRA. *See Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. 633, 639 (1997) (Chairman Gould, dissenting) (Board majority is "manufactur[ing] a distinction in applicable law where none exists").

Ellis holds that "it would be perverse to read [§ 2, Eleventh] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." 466 U.S. at 452 n.13. The same is true under the NLRA with regard to the unions' efforts to convince employees in other potential bargaining units to become union members. Since objecting nonmembers cannot lawfully be charged for member recruitment within *their own* bargaining unit—where the relationship to bargaining is obviously greatest—it necessarily follows that objecting nonmembers cannot be charged for member recruitment in *other* units, even "within the same competitive market." App. A at 14a, n.13.

Third, *Ellis* held:

> The free-rider rationale does not extend this far. The image of the smug, self-satisfied nonmember, stirring up resentment by enjoying benefits earned through other employees' time and money, is completely out of place when it comes to the union's overall organizing efforts. . . . [T]he free rider Congress had in mind was the employee the union was *required to represent and from whom it could not withhold benefits obtained for*

> *its members*. Non-bargaining unit organizing is not directed at that employee.

466 U.S. at 452 (emphasis added).

The *en banc* Ninth Circuit did not directly address this third *Ellis* factor either, but it applies equally to the NLRA. Local 951 owes no statutory obligation to Meijer employees in Michigan to organize and represent employees at other warehouses or food retailers, nor does Local 7 owe City Markets' employees in Glenwood Springs and Fruita, Colorado a statutory duty to organize other retailers, wholesalers, meatpackers or large general merchants like Macy's or Emporium. While Locals 7 and 951 may well have undertaken grand plans for the unionization of the entire nation—as is their right—they are under no statutory obligation to do so, and must pay for this activity from voluntary supporters. Nothing in *Beck* or the NLRA is to the contrary.

C. Based Upon Thirty Years of Precedent, *Beck* Holds That Congress' Authorization of Compulsory Dues Exactions Is "Identical" under the RLA and the NLRA. As if *Ellis,* standing alone, was not enough to raise grave questions about the propriety of the *en banc* Ninth Circuit's ruling and its lack of fealty to this Court's precedents, *Beck* slams the door on the lower court. Far from arising on a clean slate such that none of this Court's compulsory dues precedents control, *see* App. A at 14a to 23a, *Beck* explicitly applied *Ellis'* principles to the NLRA. Moreover, it did so against a backdrop of over thirty years of labor law and constitutional jurisprudence.

This Court did not act in a vacuum in *Beck* when it compared the legislative histories and congressional purpose underlying the two compulsory dues statutes, NLRA § 8(a)(3), and RLA §2, Eleventh, and found them to be "statutory equivalent[s]." *Beck*, 487 U.S. at 762.

> Our decision in *[Machinists v.] Street*, [367 U.S. 740 (1961)] is far more than merely instructive here: we believe it is *controlling*, for § 8(a)(3) and § 2, Eleventh are in all material respects *identical*. Indeed, we have previously described the two provisions as 'statutory equivalents', *Ellis v. Railway Clerks*, 466 U.S. 435, 452, n.13 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. . . . In these circumstances, *we think it clear that Congress intended the same language to have the same meaning in both statutes*.

487 U.S. at 745-47 (citations & footnotes omitted, emphasis added). Despite the blinders of the *en banc* Ninth Circuit, there is nothing equivocal about *Beck*'s use of the words "identical" and "controlling" to describe *Ellis'* limitations on the extent and reach of the two compulsory dues statutes—limitations that include this Court's unanimous determination that it is "outside Congress' authorization" to charge objecting nonmembers for union campaigns to organize and recruit new members. 466 U.S. at 451-53.

The finding that Congress intended to achieve "identical" results in enacting the compulsory unionism provisions of the two major federal labor statutes is not anomalous. This Court has consistently sought to harmonize its agency fee jurisprudence. For example, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a constitutional case challenging Michigan's compulsory dues statute, this Court held that its prior RLA decisions in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), were "controlling." 431 U.S. at 232.

Abood described its holdings in *Hanson* and *Street* as "reflect[ing] familiar doctrines in the federal labor laws." 431 U.S. at 220; *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 554-55 (1991) (Scalia, J., concurring in pertinent part) (there "is good reason to treat [*Ellis* and other statutory cases] as merely reflecting the constitutional rule").

This thirty-year harmonization of precedent and analysis between RLA § 2, Eleventh and NLRA § 8(a)(3) has been consistently recognized by the lower courts, with the *en banc* Ninth Circuit's notable exception. For example, in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (1970), *further proceedings*, 533 F.2d 1126, 1128 n.3 & 1131-32 (9th Cir. 1976), two Ninth Circuit panels held that this Court's RLA decisions in *Machinists v. Street*, 367 U.S. 740 (1961), and *BRAC v. Allen*, 373 U.S. 113 (1963), were "equally applicable" to the NLRA, and that "it is immaterial that the NLRA rather than the Railway Labor Act is involved in the present litigation."

Other circuits have ruled likewise. The United States Court of Appeals for the District of Columbia Circuit has repeatedly held that unions collecting compulsory fees under the NLRA must meet the standards of this Court's RLA and constitutional cases in order to satisfy the NLRA's "duty of fair representation." *Abrams v. CWA*, 59 F.3d 1373, 1379 (D.C. Cir. 1995) (citing "basic considerations of fairness" under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986)); *Ferriso v. NLRB*, 125 F.3d 865, 867-70 (D.C. Cir. 1997); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *see also Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1418-20 (D.C. Cir. 1997), *aff'd*, 523 U.S. 866 (1998). The Seventh Circuit has recognized that "[t]he germaneness guidance offered by the Court in *Ellis* has also been applied in private sector NLRA cases." *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1113 (7th Cir. 1996). *See*

also Shea v. Machinists, 154 F.3d 508, 511-16 (5th Cir. 1998) (recognizing the equivalency between § 8(a)(3) and § 2, Eleventh, and this Court's efforts to harmonize its compulsory dues decisions); *but see Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (questioning whether this Court's RLA and constitutional precedents apply under the NLRA).

In refusing to accept this "statutory equivalence," the *en banc* Ninth Circuit took refuge in this Court's statement that "parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes," *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686, n.23 (1981). App. A at 20a, n.19. But the *en banc* Ninth Circuit's reliance on that general proposition is of no avail here. *Beck* explicitly considered that identical point, *and distinguished it*, when it held that the RLA's compulsory dues precedents are "controlling" under the NLRA, because "§ 8(a)(3) and § 2, Eleventh are in all material respects identical." 487 U.S. at 745-46, & n.3.

In short, the *en banc* Ninth Circuit boldly, and erroneously, refused to follow this Court's longstanding harmonization of the RLA's and the NLRA's compulsory dues provisions. This Court's intervention is needed now to restore consistency among the lower courts.

D. The *En Banc* Ninth Circuit's Deference to the NLRB Also Conflicts with This Court's Precedents. The original three-judge panel granted no deference to the NLRB. Relying on *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), the panel held that deference was uncalled for because *Ellis* and *Beck* had already decided the issue, and "[t]he Board does not have the power to reverse the Supreme Court." App. E at 37a.

In contrast, the *en banc* Ninth Circuit relied upon *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to grant absolute deference to the NLRB. Notwithstanding *Ellis*' holding that nonmembers cannot be forced to pay for union organizing, and *Beck*'s finding of statutory equivalence between the RLA and the NLRA, the *en banc* court reasoned that "the NLRB remains free to determine what union activities are germane to collective bargaining in industries covered by the NLRA," App. A at 17a. The *en banc* court found it significant that *Ellis* was decided by the judiciary in the absence of an administrative agency, whereas "Congress established entirely different procedures for the interpretation of each Act" when it created the NLRB, thus "militat[ing] strongly" against applying RLA law to the NLRA, even to identical issues. *Id.*

By exalting the NLRB's views above this Court's definitive statutory interpretations in *Ellis* and *Beck*, the *en banc* Ninth Circuit ignored this critical portion of *Chevron*: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n.9. Because any coherent reading of *Ellis* and *Beck* shows that this Court has already determined the clear meaning of RLA § 2, Eleventh and NLRA § 8(a)(3) on the issue presented, review of the NLRB's decision must be based upon *stare decisis* and fealty to this Court, *Lechmere*, 502 U.S. at 536-37, not deference to a divided administrative agency which "manufacture[s] a distinction in applicable law where none exists," *Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. 633, 639 (1997) (Chairman Gould, dissenting).

None of this Court's compulsory dues cases—including *Ellis* or *Beck*—originated with the NLRB. It is too late in the

day for the *en banc* Ninth Circuit suddenly to determine that the NLRB can arrogate to itself all "expertise" over this area of the law, including portions already decided by this Court as a matter of statutory interpretation and congressional intent. The *en banc* Ninth Circuit's erroneous deferral shows that review by this Court is necessary to clarify the respective roles of the NLRB and the judiciary in determining the rights of objecting nonmembers forced to pay compulsory union dues. *Compare Vaca v. Sipes*, 386 U.S. 171, 180-83 (1967) (NLRB's "tardy assumption of jurisdiction in [duty of fair representation] cases" does not "oust the courts of their traditional jurisdiction"), and *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-75 (1989) (expressing doubts as to whether "'the Board brings substantially greater expertise to bear on these problems than do the courts'" (*citing Vaca*, 386 U.S. at 181)) *with Machinists v. NLRB,* 133 F.3d 1012, 1015 (7th Cir. 1998), *cert. denied,* 525 U.S. 813 (1998) ("It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting . . . the generalities of . . . *Beck* . . . into a workable system for determining and collecting agency fees"), and *Ferriso v. NLRB*, 125 F.3d 865, 869 (D.C. Cir. 1997) (overruling the NLRB, but nevertheless holding that it is entitled to *Chevron* deference when applying *Beck*).

In short, the divergent views of the original three-judge panel, the *en banc* Ninth Circuit, and other circuits about the level of deference owed to the NLRB when applying *Ellis* and *Beck,* show that intervention by this Court is necessary.

II. There Is a Direct Conflict Among the Circuit Courts on the Precise Issue Presented. There Is Also Uniformity of Federal and State Court Precedent in Opposition to the Ninth Circuit's Analysis.

A. The Courts of Appeals' Conflict. The *en banc* decision of the Ninth Circuit is in direct conflict with an *en banc* decision of the Fourth Circuit in *Beck v. CWA*, 776 F.2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F.2d 1280, 1282 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988).

In *Beck*, a panel of the Fourth Circuit relied exclusively on *Ellis* to hold organizing nonchargeable under the NLRA. 776 F.2d at 1211-12. When the case was reheard *en banc*, the Fourth Circuit divided 6-4 on the appropriate basis for federal court jurisdiction over the objecting nonmembers' claims. However, the *per curium en banc* opinion stated, with regard to the panel's decision on organizing and other chargeability issues, that there was "no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved." 800 F.2d at 1282. This Court is thus faced with two unanimous, but conflicting, *en banc* opinions concerning *Ellis'* application to the NLRA, and the chargeability of union organizing under that statute. Intervention by this Court is clearly warranted.

B. The Uniform State and Federal Precedents. The *en banc* Ninth Circuit's decision is unprecedented under any state or federal labor statute. It is the first and *only* decision, of *any* federal or state court, to require objecting nonmembers to pay for union organizing as a condition of employment. *See, e.g., Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 696 (6th Cir. 1996) (organizing nonchargeable under the First Amendment); *Reese v. City of Columbus*, 798 F. Supp. 463, 470 (S.D. Ohio 1992) (same); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp.

1306, 1324-25 (W.D. Mich. 1986) (same), *aff'd*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part on other grounds*, 500 U.S. 507 (1991); *Cumero v. Public Employment Rel'ns Bd.*, 262 Cal. Rptr. 46, 61-63, 778 P.2d 174, 189-91 (Cal. 1989) (organizing nonchargeable under state public-sector statute); *Breaux v. Agricultural Labor Rel'ns Bd.*, 265 Cal. Rptr. 904, 917 (Cal. Ct. App. 1990) (organizing nonchargeable under state agricultural labor statute); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 668-70 (Ind. App. 1992), *aff'd sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992) (organizing nonchargeable under state public-sector statute); *Browne v. Wisconsin Employment Rel'ns Comm'n*, 485 N.W.2d 376, 388-89 (Wis. 1992) (same); *Illinois Fed'n of Teachers v. Illinois Educ. Labor Rel'ns Bd.*, 664 N.E.2d 107, 107-09 (Ill. Ct. App. 1996) (organizing nonchargeable under state public-sector statute, despite union official's testimony that "organizing benefits unit members by increasing the local union's strength in negotiations"). Although these courts were applying statutes other than the NLRA, their reasoning, based upon *Ellis* and *Lehnert*, directly conflicts with Judge Reinhardt's opinion for the *en banc* Ninth Circuit.

In short, the rule adopted *en banc* by the Ninth Circuit has been rejected by every federal and state court that has considered the issue or its equivalent. Intervention by this Court is clearly warranted.

III. It Is Important That the Court Grant the Writ Because the *En Banc* Decision of the Ninth Circuit Affects Millions of American Workers and Upsets Well-Established Precedent and Legal Certainty.

The issue presented is important for several reasons, not the least of which is the conflicting *en banc* decisions of the Fourth and Ninth Circuits. As noted, the Ninth Circuit's *en banc*

decision upsets what has heretofore been complete uniformity of court precedents. Thus, confusion among the lower courts is now guaranteed.

Moreover, absent this Court's intervention, the NLRB General Counsel will undoubtedly cease issuing complaints challenging the chargeability of union organizing, and the Ninth Circuit's decision will be virtually unreviewable. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987). Unions and nonmembers will be hereafter consigned to years of additional federal court litigation challenging the chargeability of union organizing expenditures under the duty of fair representation. *See Beck*, 487 U.S. at 742-44. In the meantime, millions of private-sector workers subject to compulsory dues clauses under the NLRA will be forced to subsidize union organizing and membership recruitment campaigns, while workers under the RLA will not. Not only will the affected employees suffer from this legal uncertainty, but the many unions which operate under both the NLRA and the RLA will face conflicting obligations as well.

IV. If the NLRA Requires Nonmembers to Subsidize Union Organizing, the Statute Is Unconstitutional as Applied.

In *Beck*, the nonmember employees raised a constitutional challenge to the expenditure of their compulsory dues for non-bargaining purposes. This Court did not decide the issue: "We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." 487 U.S. at 761-62. The Nonmembers here have raised the identical issue, although the *en banc* Ninth Circuit brushed it aside. App. A at 9a-11a & n.11; 16a-17a & n.16. If this Court does not reverse the Ninth Circuit's statutory ruling, it should hold the NLRA unconstitutional as applied.

"State action" is present under the "exclusive representation" regime of the NLRA. While employers are not directly compelled to agree to a compulsory dues clause, the NLRA provides significant governmental pressure for them to do so, because such clauses are mandatory subjects of bargaining. Sections 8(a)(5), (d) and 9(a) of the NLRA, 29 U.S.C. §§ 158(a)(5), (d) and 159(a). Moreover, this governmental pressure to agree to some form of compulsory dues clause is applied by both the NLRB and the federal courts. *See NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *see also Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 409 (9th Cir. 1977); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130 (9th Cir. 1949).

The lower courts are divided on whether this direct governmental involvement supports a finding of state action. *Compare Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-18 (1st Cir. 1971) ("'[t]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed'" (*citing Hanson*, 351 U.S. at 232)); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1420 (D.C. Cir. 1997) ("it is not apparent why it is any less 'state action'" under the NLRA than under the RLA) *with Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); and *Price v. International Union, United Auto., Aerospace & Agric. Implement Workers of America*, 927 F.2d 88, 91-92 (2d Cir. 1991); *see also* Topol, *Union Shops, State Action and the National Labor Relations Act*, 101 Yale L.J. 1135 (1992); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, . . . raise[s] grave constitutional problems"). Intervention by this

Court is needed to resolve this confusion among the circuit courts.

Moreover, the Nonmembers' constitutional claims are substantial. "Organizing" is, at its heart, advocacy of an ideological commitment to unionism, and the marketing of the particular union to other, nonrepresented employees. In an organizing campaign, employees do not speak with one voice and are not of one mind, just as "worker and union cannot be said to speak with one voice" in political and legislative fora. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991). The NLRB's own statistics show that unions are defeated in more than half of their attempts to attain representation of employees. App. F at 89a, n.25.

As this Court has long recognized, "[t]he right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Unquestionably, union efforts to recruit new members are infused with politics and ideology. Professor Paula Voos, a labor economist who testified at trial for the UFCW unions, admitted that unions organize for a whole host of reasons, often having nothing to do with raising the wage levels of any employees. These reasons include: the desire of union leaders for political aggrandizement and power, both on the local, state and national levels, and within the union movement itself; the monetary self-interest of union leaders to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. Voos, *Union Organizing: Costs and Benefits*, 36 Indus. & Lab. Rels. Rev. 576, 577-78 (July 1983). Forcing

nonmembers to subsidize this activity violates the First Amendment. *See, e.g., Lehnert*, 500 U.S. at 520-22, 528-29.

CONCLUSION

The rule of law announced by the *en banc* Ninth Circuit conflicts directly with this Court's decisions, the decision of the *en banc* Fourth Circuit, and every lower court to consider similar issues. The Petition should be granted, and the decision below summarily reversed; or the case should be set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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